YII HUNG SIONG

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[CRIMINAL REVISION NO: 43-03-2005-III(I)]
30 AUGUST 2005

ROAD TRAFFIC: *Licence - Confiscation and suspension - Section 41(5) Road Transport Act 1987 - Defendant charged with causing death by dangerous driving under s. 41(1) - Driving licence confiscated and suspended pending trial - Whether s. 41(5) ultra vires arts. 8(1) and 5(1) Federal Constitution*

CONSTITUTIONAL LAW: *Legislation - Constitutionality of statute - Doctrine of classification - Whether founded on intelligible differentia - Whether arbitrary or reasonable - Whether differentia has rational relation to object sought to be achieved by Legislature - Whether must be presumed that Parliament 'discriminates' based on adequate grounds - Confiscation and suspension of driving licence pending trial - Causing death by dangerous driving - Whether s. 41(5) Road Transport Act 1987 ultra vires arts. 8(1) and 5(1) Federal Constitution*

CRIMINAL PROCEDURE: *Jurisdiction of court - Magistrate's Court - Constitutionality of statute - Whether magistrate has jurisdiction to adjudicate on such matters - Function and duty of magistrate - Subordinate Courts Act 1948 - Courts of Judicature Act 1964, s. 30 - Revisionary power of High Court under s. 323 Criminal Procedure Code*

The defendant was charged at the Magistrate's Court with causing death by dangerous driving under s. 41(1) Road Transport Act 1987 ('RTA'). He pleaded not guilty and, pending the trial, the magistrate ordered the confiscation and suspension of his driving licence under s. 41(5) RTA. The instant application by the defendant (hereinafter 'the applicant') to the High Court under s. 323 Criminal Procedure Code ('CPC') and s. 31 Courts of Judicature Act 1964 ('CJA') was for a review as regards the propriety of the said order made by the magistrate.

Held (dismissing the application):

[1] With respect to art. 5(1) Federal Constitution ('FC'), the applicant did not file any affidavit containing sufficient particulars of the alleged violation of his 'personal liberty' or on how the confiscation and suspension of his driving licence had deprived him of his livelihood. Therefore, since the applicant was unable to demonstrate how his 'personal liberty' was adversely affected by the order of the magistrate, there was no reason for the High Court to exercise its revisionary powers in respect thereof. (p 162 d)

[2] With respect to the question whether s. 41(5) RTA offends art. 8(1) FC, it must be recognised that although s. 41(5) RTA has created a 'classification', it is one that is "founded on an intelligible differentia which distinguishes persons that are grouped together from others who are left out of the group". The classification is not arbitrary but is reasonable and acceptable because the "basis of the classification (*ie*, death of a person) which the legislature has adopted as constituting the dissimilarity in circumstances is not arbitrary". The curtailment of a driver's rights in such circumstances is not obnoxious as it is founded on an intelligible differentia. (pp 165 b-h, 166 a-h & 167 a-e)

[2a] The differentia also bears a rational relation to the object sought to be achieved by the Legislature. There is definitely a nexus between the basis of the classification and the object of the RTA (which is to protect third parties against risks arising from the use of motor vehicles). The confiscation and suspension of the licence of a driver who has caused the death of a person on the road is a measure that is consistent with the underlying policy or objective of the RTA. It must be presumed that Parliament understands and appreciates that "its discriminations are based on adequate grounds". (pp 167 g-h & 168 a)

[2b] Consequently, s. 41(5) RTA is not inconsistent with, nor does it offend or violate, the equal protection demands of art. 8(1) FC. (p 168 b)

[3] The earlier application by the applicant challenging the constitutionality of s. 41(5) RTA was not properly before the Magistrate's Court as the said court did not have the jurisdiction to hear such a matter under the Subordinate Courts Act 1948 or the Criminal Procedure Code. (p 168 c-h)

Case(s) referred to:
Asiatic Engineering Co v. Achhon Ram AIR [1951] All 746 ***(refd)***
Bank of Baroda v. R Nagachaya Devi AIR [1989] SC 2105 ***(foll)***
Charanjit Lal v. Union of India AIR [1951] SC 41 ***(refd)***
Danaharta Urus Sdn Bhd v. Kekatong Sd Bhd [2004] 1 CLJ 701 FC ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1977] 2 MLJ 155 ***(refd)***
Government of Malaysia & Ors v. Loh Wai Kong [1979] 2 MLJ 33 ***(refd)***
Harmenderpall Singh Jagara Singh v. PP [2005] 1 CLJ 323 HC ***(refd)***
Idu Beg [1881] 3 All 776 ***(refd)***
Lindsley v. National Carbonic Gas Co [1911] 220 US 61 ***(refd)***
Malaysian Bar & Anor v. Government of Malaysia [1987] 1 CLJ 459; [1987] CLJ (Rep) 185 SC ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan [2002] 4 CLJ 105 FC ***(refd)***
PP v. Su Liang Yu [1976] 2 MLJ 128 ***(refd)***
Ram Prasad v. State of Bihar AIR [1953] SC 215 ***(refd)***
Sagir Ahmad v. Government of UP AIR [1954] AIR 256 ***(refd)***
State of WB v. Anwar Ali AIR [1952] SC 75 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 41, 42
Criminal Procedure Code, ss. 323, 388(1)
Federal Constitution, arts. 5(1), 8(1)
Penal Code, ss. 299, 300
Road Transport Act 1987, s. 41(1), (5)

Penal Code 1860 [India], ss. 299, 300

Other source(s) referred to:
Ratanlal & Dhirajlal's, *The Law of Crimes*, 1982 (Reprint), pp 732, 735
Stephen A Hirsch, *Yap Sing Hock v. PP: Time For a Quick and Decent Burial*, [1993] 3 MLJ lxxiv

For the applicant - Francis Teron; M/s Thomas, Shankar Ram & Co
For the respondent - Syarifuddin Abdul Rasa DPP

Reported by Gan Peng Chiang

JUDGMENT

Clement Skinner J:
On 20 September 2004 Yii Hung Siong ('the applicant') was charged at the Magistrate's Court Kuching with causing the death of a road user by his dangerous driving, an offence punishable under s. 41 of the Road Transport Act 1987 ('the RTA'). On his pleading not guilty to the charge, the learned Magistrate acting pursuant to s. 41(5) RTA ordered the confiscation and suspension of his driving licence until the disposal of the case against him ('the

said order'). The applicant now applies to the court to exercise its revisionary powers under s. 323 of the Criminal Procedure Code ('the CPC') and s. 31 of the Courts of Judicature Act 1964 to review the correctness or propriety of the said order made by the learned Magistrate.

The brief facts leading to this application are these.

On 7 December 2004 the trial of the applicant commenced. Two days later on 9 December 2004 his counsel applied to the learned Magistrate to revoke the said order on the grounds that its imposition was tantamount to punishing the applicant even before he was found guilty of the offence, and that his livelihood as a driver was severely affected by the said order which, according to counsel, was merely directory and not mandatory. The applicant's application was refused by the learned Magistrate.

Then in late March 2005 the decision of the High Court, Johore (per Syed Ahmad Helmy J) in *Harmenderpall Singh Jagara Singh v. PP* was reported in [2005] 1 CLJ 323, in which s. 41(5) RTA was struck down as being unconstitutional, in that, it offended against art. 8(1) of the Federal Constitution which afforded equality to all persons before the law. Accordingly on 29 March 2005 counsel for the applicant, relying on the decision in *Harmenderpall Singh*'s case, made another application for the said order to be revoked but the learned Magistrate declined to do so as he felt that he was bound by his earlier decision on the matter. The learned Magistrate indicated to the applicant, however, that the applicant was not precluded from invoking the revisionary powers of the High Court.

On 4 April 2005 the applicant wrote to the High Court on the matter, hence this hearing.

Before me Mr. Francis Teron of counsel for the applicant repeated the arguments he made before the Magistrate. Mr. Teron further submitted that for all the reasons given by the learned judge in *Harmenderpall Singh*'s case, I too should follow the decision in that case and hold that s. 41(5) RTA is unconstitutional as it offends against art. 8(1) of the Federal Constitution.

Encik Syarifuddin Hj. Abdul Rasa the learned Deputy Public Prosecutor who appears on behalf of the Public Prosecutor opposes the application and took two points. First, he drew attention to the fact that there are two parts to the decision in *Harmenderpall Singh*'s case, namely, that part of the decision which deals with the same submissions that were raised by the applicant in this case, ie, that s. 41(5) RTA offends against art. 5(1) of the Federal Constitution as it is tantamount to depriving a driver of his livelihood. On this aspect of the case the learned judge there rejected such a contention for the following reasons:

(a) where it is alleged that a constitutional provision has been violated, such allegation must be specific and clear, containing sufficient particulars of the alleged violation – the allegation must be unambiguous. In so saying the learned judge relied on *Bank of Baroda v. R Nagachaya Devi* AIR [1989] SC 2105. On the facts before him, the learned judge found that the applicant there had not fulfilled this requirement; and

(b) relying on the ratio in *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 2 MLJ 33 (SC) and *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 4 CLJ 105 (FC), the learned judge there held that the words 'personal liberty' in art. 5(1) do not *ipso facto* confer on a person who has been issued with a driving licence any right to livelihood.

Encik Syarifuddin says with all respect, that this part of the decision in *Harmenderpall Singh* was correctly decided and urges me to follow it. I should point out that the applicant here did not file any affidavit containing sufficient particulars of the alleged violation of his 'personal liberty' or how the confiscation and suspension of his driving licence has deprived him of his livelihood. As the applicant is unable to demonstrate how his 'personal liberty' has been adversely affected by the said order I see no reason to exercise the revisionary powers of the court on this ground.

Next, Encik Syarifuddin points out that the other part of the decision in *Harmenderpall Singh* deals with the unconstitutionality of s. 41(5) RTA, in that, it is said to offend against the equality protection provisions contained in art. 8(1) of the Federal Constitution. In urging me not to follow this part of the decision in that case Encik Syarifuddin takes the following points. It is his submission that there is a rationale basis for the legislature to differentiate between persons who cause death by their reckless or dangerous driving from those who do not, by directing the confiscation and suspension of the driving licence of all those persons who fall within the first mentioned class. According to Encik Syarifuddin the basis for differentiation is the gravity of the offence committed ie, the resultant death which is caused by reckless or dangerous driving, which basis, according to Encik Syarifuddin, cannot be described as being arbitrary or unreasonable. As an example of an instance where the legislature has used the gravity of the offence as a basis for differentiation, Encik Syarifuddin refers to the offence of murder and culpable homicide not amounting to murder. Further, the learned Deputy Public Prosecutor submitted that there is a rational relation between the differentiation and the object sought to be achieved by the RTA, and associated himself with the arguments that were raised on this ground by the learned senior federal counsel who appeared to argue the case in *Harmenderpall Singh*'s case.

In deciding this application I accept the following propositions of law which are all set out in the judgment in *Harmenderpall Singh*'s case:

(a) it is a canon of construction when considering any law that is being impugned, that there is a presumption that the impugned law is constitutional (see *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155 and *PP v. Su Liang Yu* [1976] 2 MLJ 128);

(b) that the common law right to be heard which has found expression in art. 8(1) of the Federal Constitution is not an absolute right and can be restricted by statute law, provided the provision of written law that imposes a restriction on the right to be heard can meet the test of reasonable classification, in that, it does not offend the equality protection demands of art. 8(1) of the *Federal Constitution (see Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 (FC) and *Datuk Harun Haji Idris v. PP* [1977] 2 MLJ 155;

(c) the doctrine of classification has been judicially accepted as an integral part of the law when considering equal protection of the law. In *Malaysian Bar & Anor v. Government of Malaysia* [1987] 1 CLJ 459; [1987] CLJ (Rep) 185 Salleh Abas LP described the doctrine in these terms:

> The requirement for equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the laws so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. …. Since the legislation can create differences the question is whether these differences are constitutional. The answer is this; if the basis of the difference has a reasonable connection with the object of the impugned legislation the difference and therefore the law which contains such provisions is constitutional and valid. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause.;

(d) the test for determining whether any classification sought to be made by any particular law is constitutional or not (is the same as in India and) was stated by Suffian LP in *Datuk Haji Harun Idris v. PP (supra)* at p. 166 in the following terms:

> In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in *Sri Ram Dalmia & Ors v. Shri Justice S R Tendolkar & Ors* AIR [1958] SC 538, provided that:

(i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different basis such as geographical, or according to objects or occupations and the like. **What is necessary is that there must be a nexus between the basis of classification and the object of the law in question** (emphasis added);

(e) that where the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law there will be no violation of art. 8(1) of the Federal Constitution (see *Ong Ah Chuan v. PP* [1981] 1 MLJ 64;

(f) that if a law deals equally with all persons of a certain well-defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and, therefore, there is no discrimination amongst equals (see *Charanjit Lal v. Union of India* AIR [1951] SC 41);

(g) that a law would be regarded as discriminatory only if it discriminates one person or a class of persons against others similarly situated and denies to the former the privileges that is enjoyed by the latter (see *State of WB v. Anwar Ali* AIR [1952] SC 75);

(h) that it is only when a law is without any reasonable basis can it be termed as arbitrary (see *Lindsley v. National Carbonic Gas Co.* [1911] 220 US 61);

(i) that there is always a presumption that Parliament understands and correctly appreciated the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds (see *Ram Prasad v. State of Bihar* AIR [1953] SC 215);

(j) that a court cannot, in the nature of things, be a better judge than Parliament itself in a matter of this kind (see *Asiatic Engineering Co. v. Achhon Ram* AIR [1951] All 746);

(k) that equal protection violations are always examined with the presumption that the state action is reasonable and just, and unless it can be shown that the discrimination that has been resorted to or the power to discriminate that has been given is without reason, it cannot be said that there is unequal treatment (see *Sagir Ahmad v. Government of UP* AIR [1954) AIR 256).

With that I now turn to address the three questions relevant to determining whether s. 41(5), which effectively denies the applicant the right to be heard before the confiscation and suspension of his driving licence, offends against the equality provisions in art. 8(1) of the Federal Constitution:

(1) Is there classification?

(2) If so, is it founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group? and

(3) whether the differentia has a rational relation to the object sought to be achieved by the law in question?

With regard to the first question I accept it that because s. 41(5) directs the mandatory confiscation and suspension of the driving licence of all those persons who are charged with causing the death of another as a result of driving in a reckless or dangerous manner, while others who also drive recklessly or dangerously but who do not cause death as a result of such driving are not subject to similar treatment, there has been classification.

The next question to be asked is: Is this classification founded on an intelligible differentia? In my judgment it is, and this is where I must respectfully differ from the view expressed on the matter by the learned judge in *Harmenderpall Singh*'s case. In particular, I respectfully differ from the learned judge's finding that 'the factor which the legislature adopted as constituting the dissimilarity in circumstance between s. 41 and s. 42 (ie, death alone) becomes purely arbitrary and unreasonable in relation to the social object sought to be achieved by the Act'. According to the learned judge since the object of the Act is to provide protection to third parties against risks arising out of the use of a motor vehicle, all drivers who drive recklessly or dangerously pose the same risk or danger to other road users irrespective of whether death or only serious or slight injury results from such driving. Accordingly the learned judge reasoned that there was no rationale basis to discriminate between such drivers. Such a classification, according to him, cannot be based on intelligible differentia and would offend the equality provisions of art. 8(1) of the Federal Constitution.

In my judgment the classification is not arbitrary but based on intelligible differentia which is reasonable and acceptable. I say so for the following reasons.

To start with, every criminal charge contains two distinct types of averment, namely, (1) a recitation of or reference to the elements or 'ingredients' of the underlying statutory offence; and (2) 'particulars' which are not themselves elements of the underlying offence but which furnish the details of the alleged crime (see the article: *Yap Sing Hock v. PP*: *Time for a quick and decent burial*, by Stephen A. Hirsch in [1993] 3 MLJ lxxiv). For present purposes it will only be necessary to focus attention on the first of the two distinct types of averment in a charge ie, on the elements or ingredients of the offence.

With regard to the elements of an offence, it should be recognised that while it is possible for two or more offences to share or have a commonality of elements or ingredients, yet the legislature chooses to classify them as separate and distinct offences, based on criteria such as intent or lack of it in committing the offence, which determines whether a graver offence is committed. Put in another way the classification or differentia is based on the offence rather than the ingredients or elements constituting the offence. An example of such differentia which readily comes to mind is the case of murder as opposed to culpable homicide. Both crimes share a commonality of ingredients but whether the graver or the lesser offence is committed depends on the presence of an intent to kill, or to inflict bodily injury likely to cause death, or the knowledge that death will most probably result, or, the lack of these elements in causing the death of a person. In this regard useful reference may be made to Ratanlal and Dhirajlal's The Law of Crimes 1982 (Reprint) where the authors comment on ss. 299 and 300 of the Indian Penal Code 1860 which is in *pari materia* with ss. 299 and 300 of our Penal Code. At p. 732 of the publication the following commentary appears:

> In the Penal Code 'culpable homicide' is used as a generic term, and is exhaustively sub-divided into two species, namely, culpable homicide amounting to murder (s. 300, cls. 1, 2, 3, 4) and culpable homicide not amounting to murder (s. 299 and exceptions to s. 300). … The difference between the two offences of culpable homicide and murder are fine but real. Culpable homicide is a generic term. The offence will amount to murder if the conditions laid down in s. 300 are satisfied. If the offence comes under s. 299 or under one or other of the Exceptions to s. 300, it will be culpable homicide not amounting to murder. The offence is culpable homicide if the bodily injury intended to be inflicted is likely to cause death, it is murder, if such injury is sufficient in the ordinary course of nature to cause death. The distinction is fine but appreciable.

And at p. 735 of the same publication the authors quote the following passage from the judgment of Straight J, in *Idu Beg*, [1881] 3 All 776, 778:

> Putting it shortly, all acts of killing done with the intention to kill, or to inflict bodily injury likely to cause death, or with the knowledge that death must be the most probable result, are *prima facie* murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder.

Reverting to the issue at hand, I agree with Encik Syarifuddin that whilst the offences created by both ss. 41 and 42 of the Act may share similar elements ie, reckless or dangerous driving, when the legislature directed in s. 41(5) that there should be an immediate confiscation and suspension of a driver's licence where death results from such driving, the classification or differentiation made in s. 41 (5) being based on the graver of the two offences which is reflected by the death of the road user, that basis of classification which the legislature has adopted as constituting the dissimilarity in circumstances is not arbitrary but has a reasonable basis which, to my mind, is permissible. In my judgment the curtailment of a driver's rights in the circumstances just described is not obnoxious as it is founded on intelligible differentia, which is not so different, for example, from the case of a person who is charged with murder who has his liberty curtailed, as opposed to a person charged with culpable homicide not amounting to murder whose liberty is not curtailed. In the former case, because the accused is charged with the graver offence which is punishable by death, s. 388(1) CPC operates to deny him bail pending trial except in the very limited circumstances mentioned in the section, the effect of which is that he suffers *de facto* imprisonment even before he is convicted which is clearly repugnant to that fundamental principle of criminal law that a person is presumed to be innocent and cannot be punished until found guilty.

The next question that must be asked is: Does the differentia have a rational relation to the object sought to be achieved by the law in question? In my judgment there is definitely a nexus between the basis of classification and the object of the RTA. I say so for the following reasons. The policy underlying the RTA, as can be seen from its preamble, is to protect third parties against risks arising out of the use of motor vehicles. In my judgment it is consistent with that underlying policy that a measure such as the confiscation and suspension of the licence of a person who has caused the death of a road user, be imposed as a step towards achieving the object intended by the RTA. With regard to the particular mode or measure selected to achieve the objective ie, immediate confiscation and suspension of a driver's licence, there is always a presumption that Parliament understands and correctly appreciates the needs of its people, that its laws are directed to problems made manifest by

experience and that its discriminations are based on adequate grounds (see *Ram Prasad v. State of Bihar (supra)*) and I have not heard any arguments that would lead me to hold that the presumption has been rebutted.

For all the above reasons I find that s. 41(5) is not inconsistent with nor does it offend or violate the equal protection demands of art. 8(1) of the Federal Constitution. There is no reason to strike it down as unconstitutional. I accordingly refuse to exercise the revisionary powers of the Court.

There is a final matter that needs to be addressed. Although it was not raised by either party I find it appropriate to do so as it would have been another reason to refuse to exercise the revisionary powers of the High Court in this case. It has to do with the scope of the supervisory powers of this court when acting in revision and whether the applicant could, in the first place, properly make an application of the nature which he did to the learned Magistrate.

It will be recalled that the applicant here had sought to challenge the constitutionality of s. 41(5) RTA before the learned Magistrate. But the question is, could the learned Magistrate adjudicate on such a matter? In my judgment the learned Magistrate did not have jurisdiction to do so. I am unable to find any provision in the Subordinate Courts Act 1948 or in the Criminal Procedure Code or any other written law that confers jurisdiction on a Magistrates' Court to hear and determine questions on the constitutionality of any law. In my judgment, in the context of the proceedings that was taking place before him, that is, hearing an application by the applicant to revoke the said order under s. 41(5) RTA, the function and duty of the Magistrate was to decide the law as it is and not as it ought to be because if he were to attempt to do the latter he would in effect be enquiring into and deciding on matters he has no jurisdiction to. If in deciding the law as he finds it any question on the constitutionality of the law arises, the Magistrate may reserve the question for determination by the High Court under s. 30 of the Courts of Judicature Act 1964.

It must follow from what I have said that since the learned Magistrate did not have jurisdiction to adjudicate on the matter placed before him, the question as to the propriety or correctness of the said order is not a proper matter for me to review under the supervisory powers of the High Court under s. 323 CPC.

In the result I dismiss the application.